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SUPREME COURT, U.S.
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No. 03-1517

IN THE

Supreme Court of the United States

TIM SCARROTT and ANDREW KOPONEN,

Petitioners,

v.

KELY WILKINS, Individually and as the Successor in Interest to Decedent William Alberto Wilkins; WILLIAM ALBERTO WILKINS, Individually; THE ESTATE OF WILLIAM WILKINS; WILLIAM RANDOLPH WILKINS, a minor, by and through his Guardian Ad Litem, Kely Wilkins,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's denial of qualified immunity to Petitioner police officers who shot and killed a fellow officer while that officer was obviously effecting an arrest and had identified himself to Petitioners, where Petitioners failed to give a feasible warning before shooting, where Petitioners continued to shoot after the officer clearly was no longer armed, and where other officers at the scene testified that no reasonable police officer would have used deadly force under those circumstances.

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STATEMENT OF THE CASE

This civil rights case is unique in that police officers are on both sides. William Wilkins, a seven-year veteran of the Oakland, California, police department, was shot and killed by two rookie officers who failed to follow their training and orders. Defendants-Petitioners shot within seconds of seeing Officer Wilkins arresting the suspect identified over their police radios.[1] Petitioners failed to recognize the obvious and failed even to give a warning before shooting.

The two other police officers who witnessed this shooting both testified that no reasonable officer would have used deadly force under the circumstances.

Officer Wilkins' wife, young son, and his parents brought this action against police officers Tim Scarrott and Andrew Koponen and the City of Oakland pursuant to 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution. Pursuant to stipulation and order of the District Court, discovery was deferred on Plaintiffs-Respondents' claims of municipal liability and damages until after the District Court decided a motion for summary judgment brought by Petitioners Scarrott and Koponen. ER 464-468.[2]

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1. Defendants-Petitioners Scarrott and Koponen hereinafter will be referred to as "Petitioners."

2. Plaintiffs-Respondents hereinafter will be referred to as "Respondents." Respondents will refer to Appellants' Excerpts of Record filed with the Court of Appeals for the Ninth Circuit as "ER," Appellees' Supplemental Excerpts of Record on Appeal as "SER," and to items in the Court Record ("CR") by their District Court docket entry number.

After Petitioners' motion for summary judgment, the District Court dismissed the claims of Officer Wilkins' parents for violation of the Fourteenth Amendment. The District Court denied the remainder of Petitioners' motion, including their request for qualified immunity, and explained in its Order, filed December 17, 2002:

Applying the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the Court finds:

a. Triable issues of material fact exist which, if resolved in Respondents' favor, would support a finding that Defendants used unreasonable force and thus violated the decedent's right under the Fourth Amendment to be free from unreasonable seizure.

b. Such right was clearly established and, viewing the disputed material facts in the light most favorable to Plaintiffs, it would have been clear to a reasonable officer that his conduct was unlawful in the situation confronted.

ER 495-496.

Petitioners Scarrott and Koponen filed an appeal from that order with the Ninth Circuit Court of Appeals on January 13, 2003. Thereafter, Respondents filed with the District Court a motion to certify Petitioners' appeal as frivolous. CR 51. *See Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992); *Behrens v. Pelletier*, 516 U.S. 299, 310, 116 S. Ct. 834, 841, 133 L. Ed. 2d 773 (1995). The District Court denied that motion in an order dated April 18, 2003. CR 67.

However, in the hearing on Respondents' Motion to Certify Petitioners' Appeal as Frivolous held on March 28,

2003, the District Court further explained the basis for its denial of qualified immunity, including the disputed issues of fact compelling that ruling. *See* SER 6-8.

On November 20, 2003, the Ninth Circuit Court of Appeals affirmed the District Court's denial of qualified immunity in a decision reported at 350 F.3d 949 (9th Cir. 2003).

STATEMENT OF FACTS

Oakland Police Officer William Wilkins had just turned 29 when he was taken from an adoring wife and young son, as well as from his large family, many friends, and fellow officers. Oakland Police Chief Richard Word eulogized that Officer Wilkins' "energy, passion and zest" for his job and his life were an "inspiration" for other officers. ER 446.

Yet, in this case brought to vindicate Officer Wilkins' civil rights, Petitioners persist in ignoring the tapestry of facts supporting Respondents' claims.[3] While conceding that all

3. For instance, Petitioners' attorneys crafted one-sided declarations for all of the officers involved in this incident instead of using the officers' deposition transcripts which tell a more complete, and different, story.

As this Court has found, the lower courts have held "with virtual unanimity" that a party cannot 'create' an issue of fact by an affidavit that contradicts his prior deposition testimony. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999). *See also Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). Likewise, Petitioners here cannot *negate* the numerous questions of fact that remain in this case, by filing declarations that contradict their sworn deposition testimony. Indeed, courts can disregard declarations that contradict prior sworn deposition testimony. *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1462 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986) (when declaration contradicted prior deposition testimony "we consider as credible only appellant's deposition testimony on this subject").

disputed facts and reasonable inferences must be resolved in Respondents' favor for this question of qualified immunity, Petitioners still dispute or fail to mention many of the following facts in their Petition for a Writ of Certiorari.

On January 11, 2001, Officer William Wilkins was assigned to work in plainclothes in the narcotics unit of the Oakland Police Department. Around 11:00 p.m., Officer Wilkins and other veteran officers were pursuing a stolen white Jeep near 90th Avenue and B Street. At some point, the suspect in the Jeep got out and ran away, pursued on foot by police officers. These events were broadcast over the main police radio channel, including a description of the suspect wearing a "tan top, tan jacket, ***red shirt***, tan pants." ER 131, line 6 (emphasis added).

At that time, Petitioner officers Tim Scarrott and Andrew Koponen each had only about 4 months experience as patrol officers since finishing their field training. ER 228 (Scarrott dep. p. 84:16-18); ER 264 (Koponen dep. p. 36:14-18); ER 266 (Koponen dep. p. 42:13-19). Despite their inexperience, Petitioners Scarrott and Koponen were partners. ER 266 (Koponen dep. pp. 42-44).

At the time that the pursuit of the stolen Jeep was broadcast, Petitioners Scarrott and Koponen were already handling a serious incident involving a woman whose husband had threatened her with a gun and escaped by car. ER 267 (Koponen dep. p. 47:5-48:15). Petitioners Scarrott and Koponen abruptly left before finishing that call to get involved in the pursuit of the suspect who had stolen the Jeep. ER 234 (Scarrott dep. pp. 106:15-107:10); ER 267-268 (Koponen dep. pp. 49:14-50:16). Petitioner Scarrott believed they were "2 or 3 miles" away. ER 234 (Scarrott dep. p. 106:6-8).

While driving "code 3" with their lights and sirens on to the area of the foot pursuit, both Petitioners learned that the suspect being chased was wearing a **red** shirt. ER 268 (Koponen dep. p. 51:7-14). The dispatcher informed Petitioners that police were forming a "perimeter," basically to seal off the several block area where the suspect was believed to be.

Petitioners Scarrott and Koponen knew from the radio traffic and from their training concerning "perimeters" that there were many other police officers involved in this pursuit. ER 58, ¶ 6; ER 237 (Scarrott dep. pp. 117:1-120:4). Petitioners did not know whether some of those other officers may be undercover or in plain clothes. ER 237 (Scarrott dep. p. 117). Petitioners were able to observe other police cars in the area of 91st Avenue and B Street. ER 238 (Scarrott dep. pp. 121:21-122:18); ER 269 (Koponen dep. p. 57:5-20).

Petitioners were directed to go to the intersection of 91st Avenue and B Street. ER 112, ¶ 6; ER 58, ¶ 7. However, Petitioners were not happy with that direction, since the suspect was last seen headed away from that location. ER 279 (Koponen dep. pp. 58:2-59:23). At 91st and B, as Petitioner Koponen began to get out of the passenger side of the police car, Petitioner Scarrott accelerated to drive away from the location where they had been told to go. *Id.*

Petitioners Scarrott and Koponen saw two men near the sidewalk on B Street, closer to the corner of 90th. ER 239 (Scarrott dep. p. 125:11-22); ER 270 (Koponen dep. p. 60:12-19). Petitioner Scarrott noticed that one of the men was wearing a **red** shirt. ER 239 (Scarrott dep. p. 126:4-10); ER 325 (McClure dep. p. 24:23-25). Petitioners went there. *Id.*

The two men that Petitioners saw were Officer Wilkins and the suspect, Demetrius Phillips. At this time, Officer Wilkins was in foot pursuit of the suspect in the red shirt. Officer Wilkins saw the suspect coming down the driveway from a house near the corner of 90th and B, and confronted the suspect. ER 348 (Phillips Dep, 31-32).

Petitioners Scarrott and Koponen drove up quickly to the two men and parked diagonally in the street with their headlights illuminating the men. ER 240 (Scarrott dep. p. 129:1-4); ER 270 (Koponen dep. p. 61:7-10). With the headlights, a streetlight directly overhead, and exterior lights on the nearby house, everyone agrees that the lighting in the area of the shooting was "as good as it gets." ER 326 (McClure Dep., p 25:7-16); ER 240 (Scarrott Dep., p. 129:5-17); ER 280 (Koponen Dep., p. 100:22-24); ER 222 (Nash Dep., p. 58:10-20).

As Petitioners Scarrott and Koponen drove away from their assigned location to where the two men were on B Street near 90th, Police Officer Torrey Nash was at his perimeter position, the corner of 90th and B, standing in the "V" of his door.[4] ER 302-303 (Nash Dep., pp. 32:10-33:25). Police Officer Sean McClure was standing in the "V" of his door at 91st and B. ER 324-325 (McClure Dep. pp. 20:13-21:18).

Officer Nash testified that from his location at the corner, he clearly heard a voice on B Street commanding, "Lay on the ground." ER 303 (Nash Dep., 35:23-36:15). Although he did not recognize the voice, he immediately recognized that whoever gave that command was a police officer, based on the tone of the command. ER 307 (Nash Dep. pp. 49:10-

4. The "V" of the door is the space between the open car door and the car. Police use this as a position of cover to limit their exposure to threats or gunfire. ER 303 (Nash Dep. 33:13-34:6).

50:11). Demetrius Phillips described that command as given in a manner that was "forceful, like he was giving me an order." ER 368 (Phillips Dep., 113:23-25). Police are trained to use their voice in this manner. ER 307 (Nash Dep. pp. 49:10-50:11). A jury could conclude that Petitioners heard, or should have heard, this police command as well.

Officer Nash got in his car, drove to where the command came from, and saw Officer Wilkins and Demetrius Phillips. Officer Nash was going to assist in what was obviously an officer making an arrest. Petitioners' police car was already there. ER 304 (Nash Dep. 37:2-40:8). As Officer Nash began walking up to assist Officer Wilkins, ***from a distance of about 30 feet***, he saw the exact same snapshot that Petitioners saw:

> Mr. Phillips was laying on the ground with his arms extended all the way away from his body, his legs were spread apart, and his head was turned to the right, and Officer Wilkins was approaching him from his left side, which is consistent with our handcuffing in a high risk situation.
>
> * * *
>
> [T]he manner that Mr. Phillips was laying on the ground was textbook on how we perform a high risk, high risk arrest, detention or enforcement stop, as far as the position of his extremities and his head.
>
> The position that Officer Wilkins was standing in, again, offset to the left, and a matter of steps, three or four steps away from him, is also consistent with that.

ER 304 (Nash Dep. 40:4-8), ER 306 (Nash Dep. 46:11-47:22). Officer Nash emphasized, **"That alone would make**

another – a reasonable officer in my opinion, you know, come to the conclusion that this is an officer down here." ER 306 (Nash Dep. 47:1-3).

Officer Nash saw Petitioners Scarrott and Koponen standing outside their car. ER 304 (Nash Dep., 39:3-40:8). After Officer Nash had taken only a few steps toward Wilkins, he heard Scarrott or Koponen say "He's got a gun." *Id.* Officer Nash went back to the "V" of his door and drew his own gun. Believing that it was obvious to Petitioners that Wilkins was an officer making an arrest, Officer Nash looked to see whether the suspect had a gun in his hands. Seeing no gun in the suspect's hands, **Officer Nash assured Petitioners, "He's a cop," or "That's Will," and began walking towards Officer Wilkins again.** ER 305-306 (Nash Dep. 43:12-45:21). Officer Nash was less than 30 feet away from Officer Wilkins when he said this. ER 304 (Nash Dep. 40:4-8).

Officer Nash testified at his deposition that he made that statement, "He's a cop," or "That's Will," because he wanted Petitioners to know that Wilkins was a police officer. ER 306 (Nash Dep. 45:15-21). "And," Officer Nash explained, "I also made the statements because I never worked with these two other officers. And I thought that they would understand, you know, another officer when they saw him by his demeanor and his mannerisms." *Id.*

In crafting declarations to support their motion for summary judgment, Petitioners carefully avoided testimony like this from Officer Nash:

> **Q: As you sit here today, would you agree with the statement that a reasonable police officer**

should have known that Officer Wilkins was a police officer?

A: Yes.

ER 306 (Nash Dep., 47:23-48:1).

The next thing Officer Nash heard was gunshots. ER 306 (Nash Dep., 48:2-5). Officer Nash thought at that moment that someone other than Petitioners Scarrott and Koponen must be shooting, because "I didn't see a threat. I saw, again, I saw Phillips was in a position of vulnerability; I saw that Officer Wilkins had reasonable control over him; and I, in fact, was approaching to assist him. I didn't see a threat." ER 308 (Nash Dep., 55:4-16).

Officer Sean McClure, standing in the "V" of his door at 91st and B, heard the first gunshot and turned to get a clear view of the shooting. He was approximately 65 feet away from Wilkins and Phillips. ER 325 (McClure Dep., 23:17-22). Only about 5 to 10 seconds had passed from when he saw Petitioners Scarrott and Koponen pull up in their car to when the shots rang out. ER 325 (McClure Dep., 22:24-23:2).

Officer McClure saw Phillips laying on the ground, and Officer Wilkins had dropped his gun and was "retreating into the yard or kind of falling back" with nothing in his hands. ER 326 (McClure Dep., 27:12-25). As Officer Wilkins was being shot, he was moving away from Phillips with his arms "out to his side." ER 329 (McClure Dep., 37:6-25). Officer Wilkins did not have any gun in his hands. *Id.* Three to five seconds elapsed from the first shot to the last shot, while Wilkins retreated without any gun. ER 326 (McClure Dep., 28:16-19).

Officer McClure also observed Petitioner Scarrott move from his position of cover in the "V" of his door, toward Officer Wilkins, while Scarrott was shooting Wilkins. ER 326, 328 (McClure Dep., 27:18-23, 33:5-35:7). Petitioner Scarrott obviously was not in fear for his own safety; *he was on the attack.*

Officer McClure never saw Officer Wilkins make any kind of threatening gesture toward anyone. ER 329 (McClure Dep., 38:6-13).

> **Q: At any time that evening, did you see Officer Wilkins take any actions which would lead a reasonable police officer to believe that Officer Wilkins posed a threat of violence to any person?**
>
> **A: From what I saw, no.**

Id.

Right after the shooting, Officer McClure observed that Officer Wilkins was laying about 12-15 feet away from Phillips and from his own gun – the same distance Wilkins traversed as he was being shot. ER 329 (McClure Dep., 37:2-38:2). Officer Wilkins' gun was found on the ground next to where Phillips was laying. *Id.*; ER 61, ¶ 22; ER 114, ¶ 17 (referring to the location of Phillips at "item 13," which is where Wilkins' gun was found, as set forth in the diagram at ER 124). Officer Wilkins' gun "wasn't close to where Officer Wilkins" came to rest. ER 328 (McClure Dep., 19-22).

Petitioners Scarrott and Koponen had been trained that when they decide to use deadly force, they may only shoot as long as the threat exists, and that the need for every shot must be evaluated independently. ER 216 (Scarrott Dep., 35:3-38:12); ER 264 (Koponen Dep., 34:5-19).

Officer McClure heard the shots fired continuously, with no pause. ER 326 (McClure Dep., 25:17-21). Petitioner Scarrott fired his 6 or 7 shots in 'one continuous burst,' lasting 3-4 seconds as he watched Officer Wilkins' "arm fall and his body fall to the ground." ER 246, 244 (Scarrott Dep, 156:5-25, 147:22-149:6). Petitioner Scarrott does not recall deciding independently to fire more than once. ER 246 (Scarrott Dep., 154:2-7). In fact, Petitioner Scarrott initially thought he had fired only twice. ER 244 (Scarrott Dep., 148:23-149:1).

Similarly, Petitioner Koponen fired his 7 shots in one continuous burst. ER 276 (Koponen Dep., 82:13-83:20). He has "no knowledge" as to why he fired seven shots. ER 276 (Koponen Dep., 84:3-5). A jury can find that Petitioners fired in panic, with no independent assessment of the need for each shot.

The testimony of the suspect, Demetrius Phillips, is consistent with what Officers Nash and McClure recall. When Phillips encountered Officer Wilkins, Wilkins loudly ordered him, "a couple of times," to get on the ground. ER 348, 349 (Phillips Dep., 32:7-13, 36:8-12). When Phillips responded, "Who the fuck are you?" Officer Wilkins took him to the ground with a punch and a kick. ER 348-349 (Phillips Dep., 32:11-34:5). Then, Officer Wilkins pointed his gun at Phillips, who was on the ground. ER 349 (Phillips Dep., 34:3-7).

Next, Phillips heard, "He's got a gun." ER 350 (Phillips Dep., 39:8-16). Then, Officer Wilkins "pulled off the hoodie[5] and he looked back and he was like, **'It's me, Willie.'** And he turned back around and they said, 'He's got a gun,' and they shot him." ER 352 (Phillips Dep., 46:12-47:15). When

5. Slang for the hood of a hooded sweatshirt, like Officer Wilkins was wearing.

Officer Wilkins removed his hood, turned around toward Petitioners, and said, **"It's me, Willie,"** "he said it loud." ER 352 (Phillips Dep., 48:21-25). Petitioner Koponen was only 10-15 feet away. ER 272 (Koponen Dep., 68:12-69:6). A reasonable officer in Petitioner Koponen's position would have seen and heard Officer Wilkins identify himself.

Consistently with Phillips' account, Petitioner Scarrott also recalls Officer Wilkins turning to look at Petitioners before Petitioners began shooting. ER 243 (Scarrott Dep., 143:4-144:7). Officer Nash is less sure, but believes Officer Wilkins may have turned toward Petitioners, then turned back, before they shot him. ER 309 (Nash Dep., 59:13-60:6).

Petitioner Scarrott claims that Petitioners yelled warnings to Officer Wilkins to "Freeze" and "Drop the gun," four or five times each, which he claims Officer Wilkins ignored before they shot him. ER 242-243 (Scarrott Dep., 139:5-141:5); ER 59 ¶ 12.

However, Petitioner Scarrott's claim that he and Petitioner Koponen gave any command or warning, or said anything other than "He's got a gun," is sharply disputed by his partner and fellow Petitioner. Petitioner Koponen testified that the ***only*** thing he said was "Tim, he's got a gun." ER 275 (Koponen Dep., 79:2-80:8). Petitioner Koponen never said, "Freeze," or anything else. *Id.* ***Petitioner Scarrott never said anything at all.*** *Id.* ***Nobody ever said "drop the gun."*** *Id.*

Likewise, Demetrius Phillips only heard someone say "He's got a gun," and never heard Petitioners give any warning or say anything else. ER 350 Phillips Dep., 41:5-16); ER 106-107 (Phillips Statement). Phillips "definitely" only heard, "He's got a gun." Nobody said, "police." *Id.*

Officer McClure did not hear Petitioners say anything before shooting. ER 325 (McClure Dep., 23:25-24:9). And the only thing that Officer Nash is sure that he heard Petitioners say is, "He's got a gun." Officer Nash "can't be for sure" about whether Petitioners said anything else. ER 305 (Nash Dep., 41:2-25). Officer Nash did not hear anyone say "Drop it." *Id.*

Petitioners now claim that "a warning was not feasible." Petition, p. 23. Commands and warnings were clearly feasible, since Petitioner Scarrott offers disputed, and unsupported, testimony that he gave repeated commands before shooting. ER 242 (Scarrott Dep., 139:8-140:14). **Thus, Petitioners cannot now claim that they had no time to give any commands or warnings.** And in any event, a jury could conclude that any quickness in the situation was due to Petitioners' premature decision to shoot in panic. This did not need to be, and was not, a "split second" situation. ER 397-398, ¶¶ 26-27.

Petitioner Scarrott has no support for his claim that he said *anything* before shooting Officer Wilkins. Petitioner Koponen disputes Scarrott's claim that he said anything. ER 275 (Koponen Dep., 79:2-80:8). Neither officer made any commands or gave any warning before shooting. Yet, Officer Wilkins' alleged failure to heed the disputed "commands" was the only objective reason given by Petitioner Scarrott for shooting Officer Wilkins.

Petitioner Scarrott offers his current subjective feelings for why he decided to use deadly force, including what he can "imagine," was "wishing," "hoped," or what he imagines the suspect might have been feeling. ER 59 (Scarrott Declaration, ¶¶ 12, 14). However, Petitioner Scarrott's feelings and speculation are not the basis for an objectively

reasonable decision to use deadly force. Petitioner Scarrott heard Petitioner Koponen shoot first. ER 245-246 (Scarrott Dep., 152:20-153:6). Although Petitioner Scarrott claims to have made an independent decision to shoot, a jury could conclude otherwise.

Petitioner Koponen claims that he decided to shoot in response to a "movement" that Officer Wilkins made. Yet, Petitioner Koponen cannot articulate any movement whatsoever on the part of Officer Wilkins. ER 274 (Koponen Dep., 74:3-76:1). Indeed, when faced with the snapshot of Officer Wilkins holding the suspect at gunpoint, Petitioner Koponen did not shoot – consistent with the conclusion that deadly force was not justified at that time. It was only in response to some phantom "movement" by Officer Wilkins, seen by no one else, and which Petitioner Koponen cannot objectively describe, that Petitioner Koponen decided to shoot. A jury can discredit Petitioners' subjective, unsupported attempts to justify their use of deadly force.

Two highly experienced and qualified police practices experts have reviewed this matter and concluded that the use of deadly force by Petitioners Scarrott and Koponen was objectively unreasonable under these circumstances, and contravened generally accepted police practices.

Lou Reiter, the former Deputy Chief of Police of the Los Angeles Police Department and now an expert and consultant for numerous police departments, including the United States Department of Justice, has concluded that Petitioners' use of deadly force "was contrary to reasonable police action, generally accepted police practices and, in my opinion, was objectively unreasonable." ER 393, ¶ 9 (Declaration of Lou Reiter). Both the initial decision to use deadly force and the subsequent shots when Officer Wilkins

had dropped his gun were objectively unreasonable. ER 393-397, ¶¶ 9-24. Further, this was not a situation requiring "split second" decisions, nor was it "confusing" such that reasonable officers would behave rashly. These circumstances were typical of "encounters frequently addressed by officers in an urban setting." ER 397-398, ¶¶ 25-27. This was exactly the type of situation that police are trained to handle, and that reasonable police officers do handle, without tragedy on a daily basis. *Id.*

D.P. Van Blaricom is the former Chief of Police for the City of Bellevue, Washington, with 29 years in continuous police service. After a detailed and specific evaluation of the circumstances, Mr. Van Blaricom concludes that Petitioners' use of deadly force was not justified at any time. ER 421-426, ¶¶ 5-7 (Declaration of D.P. Van Blaricom). Further, Mr. Van Blaricom finds a factual dispute as to whether Petitioners gave Officer Wilkins a warning, which was feasible, before shooting. ER 424-425, ¶ 6.

Petitioners Scarrott and Koponen were looking for action that night, and unfortunately, found some. They failed to make reasonable decisions to learn more about the scene in which they thrust themselves before deciding to use deadly force. They failed to give a reasonable warning to Officer Wilkins before shooting him. They failed to assess the need for each gunshot independently, instead firing in a "continuous burst" over a several second period even after Officer Wilkins had dropped his gun.

Fundamentally, Petitioners failed to observe, recognize, or heed, the numerous signs that they (and Officers Nash and McClure) were not encountering "an execution," but merely another officer effecting a high risk arrest. As Officers Nash and McClure testify, no reasonable officer under these circumstances would have used deadly force.

And as the District Court explained its denial of qualified immunity, "Nobody can dispute the fact that the law is clearly established that you can't go blowing away a police officer making an arrest." SER 6. At the hearing on Plaintiff's Motion to Certify Petitioners' Appeal as Frivolous, the District Court further explained:

> . . . Although I did make reference to the "It's me, Willie," it has to be taken in the context of all the other facts which are either undisputed or in dispute.
>
> The Plaintiff has presented a great deal of evidence on the issue of whether the Defendant officers should have known that Officer Wilkins was in fact a police officer, based on the manner in which he was holding the person at gun point, his own stance, the spread eagle position of the person under arrest, the red shirt that was consistent with what went over the broadcast, the fact of where they were coming from, the fact that other officers recognized immediately this was a police arrest, the fact he didn't run away when police officers came right up – he kept on in the same behavior – the fact that he turned toward them, identified himself, and no warning – if he did identify himself – no warning at that point was given.
>
> You have a man turning away from the activity that they're concerned about, turning toward the officers, identifying himself both facially and verbally, and at that point, if he said that, no one says, "Drop it. We said, drop it." They put nine bullets in him at that point.

> And under these circumstances, and again, as I say – you're shaking your head – but we weren't there, and all of this hasn't been played out to a jury. So we have fragments. We don't know how fast this went down, what was the speed at which the behavior occurred, who said what, when, did another officer say, "It's a police officer. It's Willie," and appear unconcerned about the fact that he was holding someone at gun point.
>
> There are so many facts here, both disputed and undisputed, that bear on the reasonableness of the perception of whether this was or wasn't a police officer, and that is why I am saying that I think those issues have to be determined by a jury. It's obvious that if he was a police officer, you don't shoot him.

SER 6-8.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals Appropriately Analyzed Petitioners' Claim of Qualified Immunity and Correctly Concluded that Petitioners Are Not Entitled to that Affirmative Defense

The Court of Appeals correctly applied the qualified immunity test adopted by this Court in *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001), ultimately holding:

> This case presents a complicated factual situation, in which the issues that are likely to prove dispositive are hotly disputed. If resolved in favor of the Wilkinses, these issues of material

> fact would support a finding that Scarrott and Koponen violated Wilkins' clearly established Fourth Amendment right to be free from unreasonable seizure by excessive force.

350 F.3d at 956.

However, before addressing the qualified immunity issue on the merits, the Court of Appeals had to address its jurisdiction over this interlocutory appeal. The Court of Appeals held that since interlocutory appellate review of a denial of qualified immunity is generally limited to issues of law and "does not extend to claims in which the determination of qualified immunity depends on disputed issues of material fact," *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001), *citing Behrens v. Pelletier*, 516 U.S. 299, 306, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996), "[t]he issue for decision is thus whether the officers are eligible for qualified immunity under the Wilkinses' version of the disputed facts." 350 F.3d at 951-952.[6]

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6. *See also Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). Additionally, as this Court noted in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150-151, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), in deciding a motion for summary judgment,

> [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. [ ] Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. [ ] Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. [ ] That is, the court

(Cont'd)

Accordingly, the Court of Appeals "assum[ed] that the version of events offered by the non-moving party is correct," 350 F.3d at 951, just as Petitioners insist all courts of appeal should do under these circumstances. *See* Petition, pp. 10-11.

The Court of Appeals next analyzed the case using the *Saucier* two-step analysis. The Court of Appeals recognized,

> The threshold inquiry in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. *Saucier v. Katz, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)*; *see also Billington v. Smith, 292 F.3d 1177, 1183 (9th Cir. 2002)*. This general evaluation of the constitutionality of the alleged conduct, however, is not sufficient; we must also determine whether the actions alleged violate a clearly established constitutional right, where 'clearly established' means that "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier, 533 U.S. at 202*.

350 F.3d at 954. The Court of Appeals also recognized that "[q]ualified immunity thus 'provides ample protection to all

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(Cont'd)

> should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.

Reeves, 530 U.S. at 150-151 (internal citations and quotations omitted).

but the plainly incompetent or those who knowingly violate the law.'" 350 F.3d at 955, *citing Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986).

The Court of Appeals pointed out that under the second step of the *Saucier* analysis, "Even if [an officer's] actions did violate the Fourth Amendment, a reasonable but mistaken belief that his conduct was lawful would result in the grant of qualified immunity." 350 F.3d at 955.

It is here that the unique factual presentation of this case required the Court of Appeals to consider Petitioners' assertion of qualified immunity in a manner appropriate for the facts of this case. For this is not the usual excessive force case where the conduct of the decedent, or the manner and amount of force used by officers, are substantially in dispute. In this case, it is obvious and undisputed that the Fourth Amendment forbids the use of deadly force by a police officer 'in the situation Petitioners confronted' – i.e. against another officer engaged in a lawful arrest – and no reasonable officer could be mistaken about that prohibition.[7]

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7. "There can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991), *cert. denied*, 506 U.S. 972 (1992), *citing Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). "[S]uch force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3. "Moreover, whenever practicable, a warning must be given before deadly force is employed." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998), *citing Garner*, 471 U.S. at 12.

"It has long since been established that police officers are not relegated to a watered-down version of constitutional rights." (Cont'd)

The Court of Appeals explained:

> . . . For the reasons outlined below, we do not need to reach the second step of the qualified immunity analysis to decide this case.
>
> At the time of the shooting, and unlike the other police officers at the scene, the officers were operating under the mistaken impression that Officer Wilkins was a civilian threatening another civilian with a gun. Thus this case does not present the usual questions, where a given set of facts is known to all parties, and the issue on appeal is whether the defendants' actions were prohibited by the Constitution, or whether their mistaken belief that the conduct was lawful was in fact reasonable.
>
> It is undisputed—and the officers do not contest—that the Fourth Amendment bars the use of deadly force against a fellow police officer effecting an arrest, and that there could be no reasonable mistake about this prohibition. Indeed, in *Jensen v. City of Oxnard, 145 F.3d 1078 (9th Cir.), cert. denied, 525 U.S. 1016, 142 L. Ed. 2d*

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Jensen v. City of Oxnard, 145 F.3d 1078, 1085 (9th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998), *citing Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967). In *Jensen*, another 'friendly fire' police shooting case, the Ninth Circuit held that where, "in the turmoil of events, [the defendant officer] mistook [decedent Officer Jensen] for a gun-wielding occupant of the premises and shot him to death," the decedent officer's estate could assert a Fourth Amendment claim from which there was no qualified immunity. 145 F.3d at 1082, 1085-1087.

> *449, 119 S. Ct. 540 (1998)*, we held that "it was clearly established that police officers retain their Fourth Amendment rights," *145 F.3d at 1085*, and obvious from common sense that the decedent police officer in that case "had the right to be free from an unreasonable seizure even from a fellow officer in the course of police work." *Id. at 1086.*
>
> But it is equally uncontested that the officers did not believe that they were shooting a police officer. The crucial question, therefore, is whether their mistaken belief that Wilkins was a civilian was reasonable under the circumstances. Scarrott and Koponen could not have been reasonably mistaken as to the legality of their actions had they realized that Wilkins was a police officer. As a result, the officers' entitlement to summary judgment is determined solely by the application of the first stage of the qualified immunity analysis.
>
> The objective reasonableness of the officers' conduct in this case turns on their mistake of fact with regard to Officer Wilkins' status and purpose at the scene that night. In turn, whether this mistake of fact was reasonable depends on which version of the facts is accepted by a jury.

350 F.3d at 955.

Petitioners fixate on the first sentence of that section of the opinion, out of context. Still, the Court of Appeals was careful to point out:

> **We emphasize that our decision here does not affirm a reflexive denial of summary judgment**

> **whenever a material issue of fact remains to be resolved, a practice which the Supreme Court rejected in *Saucier*. Even applying the step-by-step qualified immunity analysis outlined in *Saucier*, there is no question whether the officers' actions in this case violated clearly established law. They did.**

Id. (emphasis added).

Applying any test for qualified immunity, and taking the facts in the light most favorable to Respondents, both lower courts properly concluded that reasonable officers would have refrained from shooting Officer Wilkins, without warning, where Officer Wilkins was arresting the very suspect police had been chasing, using easily recognizable police techniques, under circumstances where any reasonable officer would have recognized that Officer Wilkins was a police officer, after Officer Nash told Petitioners, "He's a cop," or "That's Willie," and after Officer Wilkins stopped what he was doing, turned toward Petitioners, removed his hood, and said loudly, ***"It's me, Willie."*** Even if Petitioners failed to perceive these facts, reasonable officers would have recognized these facts under the totality of the circumstances.[8]

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8. Police must consider the "totality of the circumstances" when deciding whether deadly force is justified. *Garner*, 471 U.S. 1, 8-9 (1985) ("the question was whether *the totality of the circumstances* justified a particular sort of search or seizure"). Consideration of the totality of the circumstances "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002).

(Cont'd)

This was not a situation requiring split-second decision making. ER 397-398 (Decl. of Lou Reiter, ¶¶ 25-27).[9]

Reasonable officers would have had "fair notice" that shooting Officer Wilkins under these circumstances would violate clearly established law.[10] The law governing Petitioners' conduct was particularly well-established in the Ninth Circuit given the earlier police 'friendly fire' case, *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998) (no qualified immunity where disputed questions of fact suggested defendant-officer shot the decedent-officer "in conditions in which he should have been able to recognize that the figure he was shooting was a fellow officer."). It would have been clear to a reasonable officer that Petitioners' conduct was unlawful in the situation Petitioners confronted.

(Cont'd)

Consideration of the "totality of the circumstances" also requires officers to investigate or seek further information in some situations. *Curley v. Klem*, 298 F.3d 271, 281 (3d Cir. 2002) (no qualified immunity for officer who mistakenly shot another officer without first taking time to learn and assess more facts).

9. In fact, this Court set a standard for deadly force that does not require "split-second evaluations of unknowable facts." *Garner*, 471 U.S. at 19.

10. In *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), this Court held any requirement that facts of previous cases be "materially similar" to the case at issue is a "rigid gloss on the qualified immunity standard" that is "not consistent with our cases." *Hope*, 536 U.S. at 739. Prior cases need not be "fundamentally similar" to the case at issue either. 536 U.S. at 740. The "salient question" is whether the state of the law at the time of the events in question gave Petitioners "fair warning" that their alleged conduct was unconstitutional. *Id.*

The Court of Appeals below concluded, "If resolved in favor of the Wilkinses, these issues of material fact would support a finding that Scarrott and Koponen violated Wilkins' ***clearly established*** Fourth Amendment right to be free from unreasonable seizure by excessive force." 350 F.3d at 956 (emphasis added). In so holding, the Court of Appeals applied this Court's definition of the term 'clearly established:' "'clearly established' means that 'it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*'" 350 F.3d at 954, *citing Saucier*, 533 U.S. at 202 (emphasis in Court of Appeals opinion).

In this unique case, where it is uncontested that Petitioners' use of deadly force against a fellow officer was mistaken but ultimately unauthorized – in circumstances where reasonable officers would have known that the situation they were confronting was another officer arresting the suspect they had been pursuing, or at least where reasonable officers would have made a reasonable attempt to investigate or seek further information before shooting – both the District Court and the Court of Appeals properly determined that Petitioners are not entitled to qualified immunity from trial.

B. The Court of Appeals Decision in this Case Is Not in Conflict with the Decision of Any Other United States Court of Appeals on the Same Important Matter

Petitioners loosely describe a number of disparate qualified immunity decisions from other circuits of the United States Court of Appeals, and contend that the present case is illustrative of a "conflict." Petitioners have not demonstrated any such conflict, nor even that the present decision of the Ninth Circuit Court of Appeals is incorrect.

The level of generality with which Petitioners address those other decisions makes meaningful comparison impossible. However, the other decisions Petitioners raise deal with diverse factual situations and claims, and do not address Fourth Amendment claims arising from 'friendly fire' police shootings like the present case.

Fortunately, 'friendly fire' police misconduct cases are infrequent in the Court of Appeals. But two other such cases resulted in the same denial of qualified immunity to the shooting officers as in the present case. *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998) (police officer not entitled to qualified immunity where he shot a fellow officer "in conditions in which he should have been able to recognize that the figure he was shooting was a fellow officer"); *Curley v. Klem*, 298 F.3d 271, 281 (3d Cir. 2002) (no qualified immunity for officer who mistakenly shot another officer without taking time to learn and assess more facts).

In their criticism of courts' decisions to leave the resolution of material questions of fact for the jury, it appears that Petitioners would seek to reverse the long-established rule that at summary judgment, and when considering the affirmative defense of qualified immunity, all facts and reasonable inferences therefrom must be considered in the light most favorable to the non-moving party.

Petitioners urge the adoption of a qualified immunity standard that would resolve factual disputes before trial in favor of defendant officers, and that would accept defendants' self-serving, post-hoc, subjective excuses for their violation of Constitutional rights as the basis for granting qualified immunity. This Court has never suggested the imposition of such a lopsided and unfair hurdle for those whose

Constitutional rights may have been violated. The "salient question" is whether the state of the law at the time of the events in question gave Petitioners "fair warning" that their alleged conduct was unconstitutional. *Hope*, 536 U.S. at 740.

Petitioners have not demonstrated any conflict between the circuits of the United States Court of Appeals on this matter. The Court of Appeals below correctly decided to affirm the District Court's denial of qualified immunity in this hotly disputed, tragic case.

CONCLUSION

For these reasons, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully Submitted,

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